APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1376

UNITED STATES OF AMERICA, *Appellee*,

v.

RAYMOND BIRCH, *Appellant*.

No. 72-1377

UNITED STATES OF AMERICA, *Appellee*,

v.

BIRSEN N. BIRCH, *Appellant*.

Appeals from the United States District Court for the District of Maryland, at Baltimore. HERBERT F. MURRAY, *District Judge*.

(Argued October 2, 1972. Decided December 12, 1972.)

Before HAYNSWORTH, *Chief Judge*, and CRAVEN and BUTZNER, *Circuit Judges*.

BUTZNER, Circuit Judge:

Raymond R. Birch and his wife, Birsen N. Birch, were convicted of violating 18 U.S.C. § 499 (1970).[1] On this ap-

[1] Title 18 U.S.C. § 499 provides:

Whoever falsely makes, forges, counterfeits, alters, or tampers with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with intent

peal they contend that the district court lacked jurisdiction to try them, that the court should have granted their motions for judgments of acquittal, and that the court should have allowed them to introduce evidence in support of the defenses of justification and duress. Finding no cause for reversal in these assignments of error, we affirm.

Mr. Birch, a civilian employee of the United States Department of Defense, lived with his wife in the Federal Republic of Germany. In October 1970 a German court convicted both of them of mistreating a young servant and sentenced them to jail. The court released them from custody pending appeal upon the condition, among others, that they surrender their identity documents and passports. Embittered by their trial and apprehensive of the future, they decided to flee from Germany to the United

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to defraud uses or possesses any such pass or permit, or personates or falsely represents himself to be or not to be a person to whom such pass or permit has been duly issued, or willfully allows any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

The indictment against the Birches contains six counts. Count One charged:

> ". . . At Babenhausen, Federal Republic of Germany, Raymond R. Birch and Birsen N. Birch . . . did falsely make, forge, and counterfeit, and did cause to be falsely made, forged, and counterfeited, a military and official pass and permit, issued by and under the authority of the United States, to wit: false military leave orders in the name of one Sergeant First Class Jack L. Finn, which were to be used without legal authority by the defendant Raymond R. Birch."

Count Two charges the defendants violated the statute in the same manner as they did in Count One with respect to false leave orders in the name of Sergeant First Class Vivian L. Finn, which was to be used by Birsen N. Birch.

Count Three charges:

> ". . . At Munich . . . Raymond R. Birch . . . did, with intent to defraud, use and possess a falsely made, forged, and counterfeited military and official pass and permit, issued by

States. They sought help from a United States army sergeant, who provided them with false applications for identity cards, immunization records, and leave orders in the fictitious names of Sergeant 1st class Jack L. Finn and Sergeant 1st class Vivian L. Finn. Using these aliases, Mr. and Mrs. Birch escaped from Germany on commercial airline flights to the United States.

The indictment charged the Birches violated § 499 in Germany. The defendants do not challenge Congress's constitutional power to punish the extraterritorial forgery or false use of government documents. Instead, they contend (a) that in enacting § 499 Congress did not invoke extraterritorial jurisdiction, or (b) that even if it did, the indictment did not charge intent to defraud the United States government, an essential predicate for extraterritorial jurisdiction.

A federal statute is not necessarily limited to crimes committed within the territorial jurisdiction of the United States because it lacks an express provision that it should be applied extraterritorially. United States v. Bowman,

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and under the authority of the United States, to wit: false military leave orders in the name of one Sergeant First Class Jack L. Finn, in boarding Lufthansa Airlines flight #408 from Munich to New York."

Count Four charges a similar violation by Birsen N. Birch at Frankfurt.

Count Five charges:

". . . at Munich . . . Raymond R. Birch . . . did, with intent to defraud, personate and falsely represent himself to be a person to whom had been duly issued a falsely made, forged, and counterfeited military official pass and permit, issued by and under the authority of the United States, to wit: false military leave orders in the name of one Sergeant First Class Jack L. Finn, in boarding Lufthansa Airlines flight #408 from Munich to New York."

Count Six charges a similar violation against Birsen N. Birch at Frankfurt.

260 U.S. 94, 97 (1922), which sanctioned a prosecution for defrauding a government corporation by acts committed on the high seas and in a foreign country, states the rule for determining whether a criminal law should be given extraterritorial effect. There the Court distinguished two classes of penal legislation: statutes punishing crimes against the peace and good order of the community apply only to acts committed within the territorial jurisdiction of the United States unless Congress directs otherwise; in contrast, laws punishing *fraud against the government* include by implication acts committed in foreign countries.[2]

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[2] Writing for the Court, in United States v. Bowman, 260 U.S. 94, 97-98 (1922), Mr. Chief Justice Taft said:

> . . . The Necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. . . .
>
> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

Extraterritoriality for § 499 should be inferred, therefore, because it is concerned with the counterfeiting and misuse of military passes, a species of fraud against the government. Moreover, the origin of § 499 supports this inference. The statute was originally enacted in 1917 when the United States was preparing to send a large expeditionary force to Europe.[3] It is reasonable to assume that Congress was aware that the integrity of military passes would be threatened abroad as well as at home, and it is proper to infer that Congress intended to protect the government against forgery of these papers wherever the armed forces of the United States were stationed.

The basis found in international law for extraterritorial application of § 499 is the principle of protective jurisdiction. The protective principle determines jurisdiction "by reference to the national interest injured by the offense."[4] It provides an appropriate jurisdictional base for prosecuting a person who, acting beyond the territorial boundaries of the United States, falsifies its official documents.[5]

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[3] Act of June 15, 1917, ch. 30, title X, § 3, 40 Stat. 228.

[4] Harvard Research in International Law, *Jurisdiction with* Respect to Crime, 29 Am. J. Int'l L. Supp. 437, 445 (1935). *See* United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); I Working Papers of the National Commission on Reform of Criminal Laws 69 (1970); George, *Extraterritorial Application of Penal Legislation*, 64 Mich. L. Rev. 609 (1966).

[5] Prosecution for forgery of government documents is an aspect of the protective principle emphasized by Restatement (Second), Foreign Relations Law of the United States § 33:

> § 33. Protective Principle
>
> (1) A state has jurisdiction to prescribe a rule of attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.
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> (2) Conduct referred to in Subsection (1) included in particular the counterfeiting of the state's seals and currency, and the falsification of its official documents.

Because the national interest is injured by the falsification of official documents no matter where the counterfeit is prepared, we conclude that Congress intended § 499 to apply to persons who commit its proscribed acts abroad.

We also conclude that the indictment charged offenses against the United States. Each count is framed in the language of the statute and adequately alleges a violation of its provisions. This is ordinarily sufficient unless the statute omits an element of the offense or includes it by implication. United States v. Weems, 398 F.2d 274, 275 (4th Cir. 1968), *cert. denied*, 393 U.S. 1099 (1969). Here the statute is complete. The gravamen of the offenses is the assault on the integrity of the United States and its official documents. The United States has a legitimate interest in assuming foreign governments that its military passes are valid and that counterfeits of its official documents cannot be used with impunity to deceive the citizens and officials of foreign countries. Therefore, the district court correctly held that the indictment sufficiently charged a crime against the United States, although it specified that the Birches intended to use the forgeries to deceive foreign officials and airline employees.

The principal defect in the government's proof, Mr. and Mrs. Birch complain, is the absence of testimony from any eyewitness that they actually exhibited the forged leave orders to German custom officials and airline employees when they boarded the aircraft for travel to the United States. However, display of the forgeries is not an element of the crimes defined by the statute. The offenses charged in Counts Three and Four (use of possession with intent to defraud) were completed when the Birches having accepted possession of the forged papers from the army sergeant, boarded the aircraft intending to use the counterfeits to facilitate their departure. The offenses charged in Counts Five and Six (impersonation with intent to defraud) were completed when the Birches, armed with the forgeries,

boarded the aircraft falsely posing as military personnel named as Finn.

We need not recite the evidence in detail. Viewing the proof presented by the government in its most favorable light, it tended to prove these charges beyond a reasonable doubt. Bell v. United States, 185 F.2d 302, 310 (4th Cir. 1950), *cert. denied,* 304 U.S. 930 (1951). Similarly, the evidence was sufficient to show that Mrs. Birch participated in the illegal activities charged in Counts One and Two.

Although the district judge allowed the defendants to present evidence of their concern over their plight to negate the intent to defraud required by § 499, he excluded evidence in support of the defenses of justification and duress. In this we find no error. To maintain the defense of duress or coercion the federal rule requires apprehension of impending death or serious bodily harm. D'Aquino v. United States, 192 F.2d 338, 357-58 (9th Cir. 1951), *cert. denied,* 343 U.S. 935 (1952); Gillars v. United States, 182 F.2d 962, 976 (D.C. Cir. 1950). The defendants asked the district court to apply a more lenient test, which, under the circumstances, he quite properly rejected. The defendants' belief that they were improperly convicted and their concern over the consequences of the judgment of the German court cannot justify their resort to crime. *Cf.* United States v. Haley, 417 F.2d 625 (4th Cir. 1969); Aderhold v. Soileau, 67 F.2d 259 (5th Cir. 1933).

AFFIRMED

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ORDER

Upon consideration of the petition for rehearing and for a stay of the mandate filed by RAYMOND BIRCH and BIRSEN N. BIRCH;

With the concurrence of *Chief Judge* HAYNSWORTH and *Judge* CRAVEN,

It is ADJUDGED AND ORDERED:

1. The petition for rehearing is denied.

2. The mandate is stayed pending the appellants' application to the United States Supreme Court for a writ of certiorari.

/s/ JOHN D. BUTZNER, JR.
John D. Butzner, Jr.
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CRIMINAL No. 71-0238 (False Making and Use of a Military Pass and Permit, 18 USC 499; Aiding and Abetting, 18 USC 2)

UNITED STATES OF AMERICA

v.

RAYMOND R. BIRCH
AND
BIRSEN N. BIRCH

The Grand Jury for the District of Maryland charges:

Between the 15th day of October, 1970 and the 10th day of December, 1970, the exact date being unknown to the Grand Jury, at Babenhausen, Federal Republic of Germany,

RAYMOND R. BIRCH
AND
BIRSEN N. BIRCH

the last known residence of both of whom is 2737 Atlanta Drive, Wheaton, Maryland, in the State and District of Maryland, did falsely make, forge, and counterfeit, and did cause to be falsely made, forged, and counterfeited, a military and official pass and permit, issued by and under the authority of the United States, to wit: false military leave orders in the name of one Sergeant First Class Jack L. Finn, which were to be used without legal authority by the defendant Raymond R. Birch.

COUNT TWO

And the Grand Jury for the District of Maryland further charges:

Between the 15th day of October, 1970, and the 10th day of December, 1970, the exact date being unknown to the Grand Jury, at Babenhausen, Federal Republic of Germany,

RAYMOND R. BIRCH
and
BIRSEN N. BIRCH

the last known residence of both of whom is 2737 Atlanta Drive, Wheaton, Maryland, in the State and District of Maryland, did falsely make, forge, and counterfeit, and did cause to be falsely made, forged, and counterfeited, a military and official pass and permit, issued by and under the authority of the United States, to wit: false military leave orders in the name of one Sergeant First Class Vivian L. Finn, which were to be used without legal authority by the defendant Birsen N. Birch.

COUNT THREE

And the Grand Jury for the District of Maryland further charges:

On or about the 10th day of December, 1970, at Munich, Federal Republic of Germany,

RAYMOND R. BIRCH

the last known residence of whom is 2737 Atlanta Drive, Wheaton, Maryland, in the State and District of Maryland, did, with intent to defraud, use and possess a falsely made, forged, and counterfeited military and official pass and permit, issued by and under the authority of the United States, to wit: false military leave orders in the name of one Sergeant First Class Jack L. Finn, boarding Lufthansa Airlines flight #408 from Munich to New York.

COUNT FOUR

And the Grand Jury for the District of Maryland further charges:

On or about the 10th day of December, 1970, at Frankfurt, Federal Republic of Germany,

BIRSEN N. BIRCH

the last known residence of whom is 2737 Atlanta Drive, Wheaton, Maryland, in the State and District of Maryland,

did, with intent to defraud, use and possess a falsely made, forged, and counterfeited military and official pass and permit, issued by and under the authority of the United States, to wit: false military leave orders in the name of one Sergeant First Class Vivian L. Finn, in boarding Pan American Airlines flight #73 from Frankfurt to New York.

COUNT FIVE

And the Grand Jury for the District of Maryland further charges:

On or about the 10th day of December, 1970, at Munich, Federal Republic of Germany,

RAYMOND R. BIRCH

the last known residence of whom is 2737 Atlanta Drive, Wheaton, Maryland, in the State and District of Maryland, did, with intent to defraud, personate and falsely represent himself to be a person to whom had been duly issued a falsely made, forged, and counterfeited military and official pass and permit, issued by and under the authority of the United States, to wit: false military leave orders in the name of one Sergeant First Class Jack L. Finn, in boarding Lufthansa Airlines flight #408 from Munich to New York.

COUNT SIX

And the Grand Jury for the District of Maryland further charges:

On or about the 10th day of December, 1970 at Frankfurt, Federal Republic of Germany,

BIRSEN N. BIRCH

the last known residence of whom is 2737 Atlanta Drive, Wheaton, Maryland, in the State and District of Maryland, did, with intent to defraud, personate and falsely represent herself to be a person to whom had been duly issued

a falsely made, forged, and counterfeited military and official pass and permit, issued by and under the authority of the United States, to wit: false military leave orders in the name of one Sergeant First Class Vivian L. Finn, in boarding Pan American Airlines flight #73 from Frankfurt to New York.

/s/ GEORGE BEALL
George Beall
United States Attorney

A TRUE BILL:
Foreman

The Court: Before your arrest, Mr. Birch, in Germany, what was your grade or rating in the RES?

The Witness: I was a GS equivalent, GS-13 equivalent, sir.

The Court: And what was the rate of compensation in that grade?

The Witness: At that time, sir, $18,000 a year.

The Court: And did you remain in grade 13—

The Witness: Yes, sir.

The Court: —after your arrest and until the conclusion of the trial?

The Witness: Yes, sir. That is why I mentioned, sir, how they treated us, the organization.

The Court: Go ahead, Mr. Green.

By Mr. Green:

Q. When did you receive your last paycheck?

A. On the 6th of November, I received my last paycheck from the organization.

The Court: That is November 6th, 1970?

The Witness: Yes, sir. 1970, sir. And that was it. We were notified that we'd have to vacate the apartment within, I think, three weeks. I went up to ask the commander for an extension to allow me to see if I can find adequate accommodations, pointing out I don't have furniture and anything. He says I'll see what I can do, Mr. Birch. But, unfortunately, he was unable to extend it at that time. We went to the—we did; I did—to the American military chaplain, and the American civilian chaplain, not only to see if they could find us a place to live, can they assist me in finding another job. Because no American organization would hire me, based on what has happened. And I don't speak German. And they said they would try, but to no

avail. And I asked the American Consulate for assistance. They said they would see what they can do, but unfortunately the regulations were quite restrictive. And a comment, if I may, again for Mr. Moscovich, who was the principal consular officer in there, he said it would be a complete disaster for your family to live on the German economy.

The Court: I'm sorry. I didn't hear that.

The Witness: Mr. Moscovich said to us, he said it would be a complete disaster for you and your family to have to go back and live on the German economy.

By Mr. Green:

Q. Who was Mr. Moscovich?

A. Mr. Moscovich at the time was the—I think he was in charge of the visa section of one of—an obvious job. What other jobs he had, I don't know. But he was the Consulate appointed observer during our trial. Who, it was pointed out many times behind us to our counsel and to the interpreter and to the military attorney, he said how can he observe, he's asleep half the time during court. And we found ourselves with no job, no income, no schooling, no American medical assistance, dental assistance, no furniture, no place to live. Again, being frightened to go on the economy.

Q. How long was the prospect of an appeal process, as it has been explained to you?

A. Not less than two years away, I was hoping, I was praying, I begged people, please, if I can retain my job in a lesser capacity, if I could create my housing here, I'm willing to stay and wait for the appeal. We are innocent. I had no one to turn to. I have no housing—I'm sorry. I had no housing, no income, I had five small babies. One day, perhaps in a joke, I spoke to Mr. Moscovich, please.

aren't they attempting to do something for us? I said Mr. Moscovich, if I get thrown out on a Friday, and this was three days before, I said I may end up on your steps. He giggled, not nastily, and he said, well, Mr. Birch, all I can do then is call the German police and have you taken away because this is not a housing area. I said you know I wouldn't do that, Mr. Moscovich. Anyway, we were extended, thank God, by the American military, in a housing area. But I know it was the last extension, they went way beyond what they are allowed to do. And as I say, I have been grateful for the American military, and my organization for all the years they were responsible for our survival, our protection, their interest, compassion, as against other people's feelings.

And I found myself in a situation where the disintegration, if I may use that word—I don't know if it's correct or not—of seven people, five little lives and two grown-ups, where are we going to live, what are we going to do. I did not know. I did not know. In fact—I don't know if it's proper—If I may—And I apologize—I said to my wife, my sister can't cope with the children, she hasn't got the facilities, she's sick; let's send the children home and kill ourselves.

The Court: Perhaps Mr. Birch would like to—

Mr. Green: A short recess, maybe.

The Court: —like a short recess.

(Recess had.)

After Recess

The Witness: My apologies, Your Honor. My sincere apologies. Do you want me to continue?

The Court: Wait for the next question, Mr. Birch.

The Witness: I beg your pardon, sir.

By Mr. Green:

Q. Mr. Birch, you described for us you, for lack of a better word, your predicament, or your situation following your trial. And I would like you to tell His Honor, as a result of these circumstances, what became your motivations, or what were your motivations?

A. To sit and look at a wall and say where do we go from here, and to see this disaster that will befall upon us when we are evicted. And this is the word, unfortunately, that you will be evicted, you're asked to leave, with no place to go, no one to turn to, no help. I did not know what is going to become of us. I was —I was a completely different person. I didn't know from nothing. My chief concern was looking at five small children, with a wife and myself, look at the walls, feeling like a dirty criminal. I said something has to happen, we can't just go out living in the street. There is no one to help; nothing. What is going to become of us? And I didn't know what to—I lost my appetite a long time before. To give myself false courage, I started to drink more than I—I'm not a drinker; I drank more. I did not become an alcoholic, I—I couldn't sleep because everything was on my mind; continual, continual. I have never been or heard of people being in a position of seeing a complete disaster of a family. For what? We did nothing. We stayed to prove that we are innocent. And I am sorry. Either I flipped—I don't know what. I said to myself, you can't stay. You've got to—It's impossible. I can't.

I went before—I even went to the Germans. I registered with the German police as being an American, and not with the services. I registered fine. I went—Our attorney said you haven't got a job, go on welfare. I went to welfare, They said look, there are plenty of jobs. He said you don't speak German, you can get a job for 400 marks a month, which at the time was $100. I said that doesn't even send my children to school. They don't speak German or any-

thing. And that is what I was faced with: $100-a-month job. I couldn't find a place to live. Where could I live? It's very difficult to find anyplace that has rooms for five children and two grownups. The average family doesn't have this size family. And I got to a point that nothing mattered, it was an obsession. I was only motivated with one thing: survival, to survive; that my family and myself and my wife survive this complete and utter disaster, in any way, any shape, any manner—anyway, but try to survive this disaster. Because to continue to stay in the Federal Republic of Germany is complete disaster, for us anyway. Because I don't speak the language to get a job, my wife doesn't speak the language to get a job. We have five small children, three of them are in school. Where do you turn to? I am not talking about PX privileges, I'm not talking about gasoline privileges; I'm talking about the basic American necessities. I can't afford it. I don't have the money. My children were taken out of school, though. And again, they were permitted to go back in school. And later on we found out that the chaplain paid for their schooling to go back. And the chaplain has even come to our house when he found out the problem, and compassionate, sympathetic, but he is only a human being and while he gave us the comfort, I am not of his religion as I say, I'm Jewish—but he talked to you like an individual.

Anyway, I was at the point, sir, that to remain where we were is mentally and physically impossible. I had to get away from the Germans. I had to get away from them and come home. I just had to leave them. And that was—I was obsessed from the day that this thing happened, the trial ended, and when I found out the appeal will take two years. And finally when I couldn't even remain to live any place to support my family, to even stay—and, perhaps, foolishly, knowing what happened before—stay for my appeal, which is still going through, to wait. I was willing to, I wanted to work, I wanted to live, to stay. I was not

given the chance or the opportunity to afford anything, and I found myself completely in an area where I couldn't turn to anybody because whatever anyone has done, that was the end; basically, housing, my job was finished. I went around like a—I'm sorry. And that was the position I was in by the middle of November. And nothing else, in my mind—It was the only obsession and the motivation I had in the conditions that we were under is to get away from the Germans and come home.